Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

IN RE: ESTATE OF HERBERT JOHN GLEASON, a/k/a JACKIE GLEASON, Deceased,

KENNETH E. RAINE, as Trustee of the Television Trust Agreement,

Petitioner,

vs.

MARILYN GLEASON, formerly Personal Representative of the Estate of Herbert John Gleason a/k/a Jackie Gleason,

Respondent.

On Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PUBLICATION OF A NOTICE OF ADMINISTRATION PURSUANT TO A STATE'S CREDITOR NON-CLAIM STATUTE SUFFICIENTLY SATISFIES THE REQUIREMENTS OF DUE PROCESS OF LAW OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO OPERATE AS A BAR TO THE CLAIM OF A KNOWN CREDITOR WHO IS ACTIVELY PURSUING LITIGATION AGAINST THE PERSONAL REPRESENTATIVE OF THE DECEDENT IN ANOTHER STATE DURING THE PROBATE ADMINISTRATION, WHICH CREDITOR WAS NOT GIVEN ACTUAL NOTICE OF THE NON-CLAIM STATUTE AND WHO, DUE TO LACK OF ACTUAL NOTICE, FAILS TO LEARN OF THE LIMITED CLAIMS PERIOD AND THE DISCHARGE OF THE PERSONAL REPRESENTATIVE AND IS THEREBY PREVENTED FROM PROCEEDING TO JUDGMENT AND PRESENTING HIS CLAIM TO THE PROBATE COURT?

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IN RE: ESTATE OF HERBERT JOHN GLEASON, a/k/a JACKIE GLEASON, Deceased,

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vs.

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Respondent.

On Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Kenneth E. Raine, prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth District (the "district court"), which affirmed with prejudice the dismissal of a petition for further administration by the Probate Division of the Circuit Court for the Seventeenth

Judicial Circuit in and for Broward County, Florida (the "probate court").

OPINIONS BELOW

The opinion of the district court is reported as In re Estate of Gleason, 631 So. 2d 321 (Fla. Dist. Ct. App. 1994), and appears in Appendix A to this Petition.

JURISDICTION

The district court's opinion was filed on January 26, 1994. On March 7, 1994, the petitioner sought review by the Supreme Court of Florida. On June 23, 1994, the Supreme Court of Florida entered its order declining to accept jurisdiction over the case. This order is contained in Appendix B. This court's jurisdiction is invoked pursuant to Title 28, U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. §733.702(1)(a) (1987):

Limitations on presentation of claims

(1) No claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless presented:

(a) Within 3 months from the time of the first publication of the notice of administration, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the beneficiaries adversely affected according to the priorities provided in this code and when the settlement is made within the statutory time for filing claims; or he may file a proof of claim of all claims he has paid or intends to pay.

Fla. Stat. §733.903 (1991):

Subsequent administration

The final settlement of an estate and the discharge of the personal representative shall not prevent a revocation of the order of discharge or the subsequent issuance of letters if other property of the estate is discovered or if it becomes necessary that further administration of the estate be had for any cause. However, the order of discharge may not be revoked under this section based upon the discovery of a will or later will.

Okla. Stat. tit. 58, § 333 (1981):

Bar of claims not presented in time - Exceptions

If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the county court, that the claimant had no notice as provided in this article, by reason of being out of the State, it may be presented at any time before a decree of distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or

pledged must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever: Provided, However, that when it is made to appear by the affidavit of the claimant, as above provided, that he had no notice by reason of being out of the State, it may be presented as therein provided: Provided, Further, that nothing in this section, nor in this Chapter contained, shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, but every such mortgage may be foreclosed within the time and in the mode prescribed in civil procedure, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by this code.

STATEMENT OF THE CASE

This case arises from the probate court's order dismissing with prejudice the petitioner's motion to reopen the estate of Jackie Gleason to permit him to pursue a claim against Gleason's estate. The following facts are material to the Court's understanding of the issue involved and its constitutional implications.

Jackie Gleason died in June of 1987 while domiciled in Broward County, Florida. At his death, Gleason was a defendant in ongoing litigation initiated by the petitioner in the courts of New York. The New York litigation forms the basis for the petitioner's claim against the Gleason estate.

In July of 1987, Gleason's widow, Marilyn, was appointed his personal representative in Florida. Letters of administration were issued and a notice of the administration of the estate was published in Broward County. During the Florida probate, the personal representative received actual notice of and was substituted for Gleason in the New York action. Nevertheless, she continued to defend the New York action for nearly fifteen (15) months after her discharge as personal representative.

In 1990, during the pendency of the New York action and without notice to the New York courts and/or the petitioner, the personal representative petitioned for and obtained from the probate court an order discharging her from her duties as the personal representative. Nevertheless, in February of 1992, while the New York litigation was still pending, the petitioner and the New York trial court were advised by the personal representative for the first time of her discharge.

The petitioner thereupon immediately petitioned the probate court pursuant to Section 733.903, Florida Statutes (1991), to reopen the Gleason estate, revoke the order of discharge, and reappoint Marilyn Gleason as personal representative on the grounds that she failed to fully administer the estate and obtained her discharge through fraud upon the probate court.

The personal representative moved to dismiss the petition on the grounds that the claim was time barred by operation of Section 733.702(1)(a), Florida Statutes (1987), which required that creditor's claims against the Gleason estate be presented to the probate court, if at all, within three (3) months of the publication of the notice of administration, or be forever barred.

At the hearing on the motion to dismiss, the petitioner argued, inter alia, that the application of the Florida non-claim statute in the instant case was violative of the petitioner's fourteenth amendment right to due process of law in accordance with this Court's decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), since the petitioner was a known or readily ascertainable creditor of the Gleason estate who had never been given actual notice of the creditor claims procedure or of the operation of the non-claim statute as a bar to untimely filed claims.

Notwithstanding the requirements of Pope, the ongoing New York litigation and the apparent failure of the personal representative to notify the probate court of the New York action against her, the probate court rejected the petitioner's argument and held that the petitioner's actual knowledge of the estate administration in Florida and his failure to present his claim before her discharge in 1990, warranted dismissal of the petitioner's application for further administration, with prejudice. A copy of the probate court order dismissing the petition is contained in Appendix C.

On direct appeal, the district court of appeal affirmed, with opinion. (App. A)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the state court's opinion has incorrectly adjudicated federal due process rights under the Fourteenth Amendment of the United States Constitution as those rights have been articulated by this Court. The issue at hand is "beyond the academic or the episodic" since already other Florida courts are relying on In re Estate of Gleason and perpetuating its erroneous interpretation and application of this Court's fourteenth amendment jurisprudence. See generally Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

In April of 1988, during the administration of the Gleason estate in Florida, this Court issued its decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). In Pope, the Court held that where the identity of a decedent's creditor is known or readily ascertainable, the due process clause of the Fourteenth Amendment of the United States Constitution requires that the creditor be provided with actual notice of the applicable non-claim period and of the procedure for presenting claims before his claim may be barred. In so holding, the Court reasoned that there was "little doubt" that an unsecured claim against an estate is a property interest protected by the fourteenth amendment, id. at 485, and that there was sufficient "state action" involved in the application of a non-claim statute to implicate the requirements of due process. Id. at 486.

In the instant case, it is undisputed that the petitioner was not given actual notice of the three (3) month period within which to file a claim against the decedent's estate. In re Estate of Gleason, 631 So.2d 321, 322 (Fla. Dist. Ct. App. 1994) (App. A, 4). Moreover, it was undisputed that

the petitioner was a "known or reasonably ascertainable creditor" of the decedent. Within the opinion, the district court acknowledges that the petitioner was a party to litigation against the decedent in New York at the time of decedent's death and that the litigation continued against the personal representative after the decedent's death. Id. (App. A, 2-3).

The district court concluded that notwithstanding the apparent deprivation of the petitioner's due process rights, the claim was nonetheless barred by his delay in presenting same to the probate court until after the estate had been closed. Id. at 323 (App. A, 4). The district court's decision is inconsistent with the construction previously accorded to the due process clause by this Court in Pope. In its decision, the district court states:

> We are not persuaded that the Pope court would have been sympathetic to this claimant. First the Pope court was not being asked to reopen an estate which had been closed for 14 months. Second the Pope claimant was a creditor who had no notice of the death and was merely seeking to file beyond a two month non-claim period, while this claimant was litigating against Gleason at the time of Gleason's death, was represented by counsel who knew the estate was being probated in Florida, and took no action until 14 months after the estate was closed.

Id. at 323 (App. A, 5)(emphasis supplied).

A review of the facts in Pope demonstrates how the district court misconstrued Pope. First, the creditor in Pope was the collection agency for the hospital where the decedent

died, which was attempting to collect the expenses for the decedent's last illness and clearly had actual knowledge of his death. Pope, 485 U.S. at 482. Second, the hospital's claim in Pope was presented more that four (4) years after the expiration of the statutory claims period. Id. Third, the creditor in Pope had not been given actual notice of the Oklahoma claims statute which purported to bar his recovery, id. at 482, and which was substantially similar to the Florida non-claim statute. Compare Okla. Stat. tit. 58, § 333 (1981) with Fla. Stat. § 733.702 (1)(a) (1987); see also Thames v. Jackson, 598 So. 2d 121, 123 (Fla. Dist. Ct. App. 1992) (recognizing similarity between Oklahoma's non-claim statute and Florida's 1987 statute of non-claim).

Thus, the fact of a creditor's actual knowledge of the decedent's death and the fact that a substantial period of time has passed since the expiration of the claims period were immaterial to this Court's conclusion in Pope that such a claim cannot be extinguished in the absence of actual notice to the claimant. This is evidenced by the fact that the only instruction from this Court to the trial court on remand was for a determination of whether the creditor was known or readily ascertainable. Pope, 485 U.S. at 494.

Although the district court notes correctly that the creditor in Pope was not faced with a closed estate, this Court rejected the notion that a state's "undeniable interest in the expeditious resolution of estate proceedings" should somehow vitiate a creditor's constitutional right to due process. Pope, 485 U.S. at 489-490. This is particularly true where, as here, the requirements of due process easily can be met by simply mailing the creditor a copy of the statutorily prescribed notice of administration which would inform him of the procedure by which he can protect his interests and the consequences of his failure to do so. Id.

The Pope decision was based primarily on this Court's holding in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1960). Of significance to this petition, in Mullane, this Court stated that

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. [citations omitted] . . . The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . .

Mullane, 339 U.S. at 314 (emphasis supplied).

Here, the due process requirements as set forth in Pope and Mullane mandate that the petitioner should have been given actual notice of the "required information," which would have apprised him of the procedure for presenting claims and the consequences of his failure to do so. Since the personal representative failed to provide the petitioner with actual notice of the applicability of the Florida non-claim statute to his claim, the limitations period provided for therein could not be constitutionally applied to the petitioner's claim until such notice was provided.

Both the probate court and district court went to great lengths to distinguish the instant case from the federal precedent cited above, based upon the petitioner's actual knowledge that the decedent had died and that an estate had

been opened in Florida. (App. A, 5-6; App. C, 8-10). Such facts have already been shown to have no effect on the requirement of actual notice. See discussion, supra, at p. 8. In the context of a bankruptcy proceeding, this Court, citing Mullane, held that a creditor's actual knowledge of a debtor's bankruptcy could not take the place of the official notice to be provided of the bankruptcy claims procedure and "bar date". City of New York v. New York, N.H. & H.R., Co., 344 U.S. 293 (1953).

In the City of New York case, the debtor argued that a creditor's knowledge of the bankruptcy proceedings placed a duty on the creditor to inquire about possible court orders which limited the time periods for filing claims. 344 U.S. at 297. In rejecting this claim, the Court noted that "even creditors who have knowledge of a [bankruptcy] reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred". Id. These same precepts shall hold true for the estate creditor who is actively litigating his claim with the personal representative and presumably has actual knowledge of the fact of her appointment and the administration of the decedent's estate; namely, that he would be provided reasonable notice before his claim was to be barred. In fact, in Pope, this Court cited with approval its decision in the City of New York case and noted that "probate proceedings are not so different in kind [than bankruptcy proceedings] that a different result is required here." Pope, 485 U.S. at 491.

If this Court declines to review the district court's decision, it will become precedent upon which Florida personal representatives can circumvent the requirements of Pope and the fourteenth amendment by rushing to close an estate through fraud or other means, obtain their discharge,

and then shield themselves and their estates from further liability for creditor claims by merely citing the In re Estate of Gleason decision. Unless it is reversed, the district court's decision will eviscerate the protections of the fourteenth amendment since it is axiomatic that all creditors who seek the protections afforded by Pope will have already been delayed in presenting their claims because of the lack of actual notice of an applicable claims statute.

Since the In re Estate of Gleason decision was issued, at least one other Florida court has followed the district court's lead of circumventing Pope by carving out exceptions which are repugnant to the principles of due process found in Pope, Mullane, and City of New York. In In re Estate of Danese, 19 Fla.L.Weekly D 1652 (Fla. Dist. Ct. App. 1994), the appellate court stated, albeit erroneously, that actual knowledge of the information necessary to timely file a claim satisfies the requirements of due process. Id. at 1653. That court went on to hold that a creditor's actual knowledge of the opening of an estate was sufficient knowledge to bar an untimely claim. Id. Relying principally upon the holding in In re Estate of Gleason, the Florida appellate court echoed its sentiments in stating that the Pope court would not have been "sympathetic" to the creditors of the Danese estate. Id.

The inference to be drawn from In re Estate of Gleason and its progeny is that somehow this Court will be less sympathetic in remedying a denial of due process where the constitutional deprivation has continued for a period of time sufficient to permit the personal representative to obtain her discharge. It is abhorrent to due process to argue that the mere passage of time should somehow emasculate the constitutional protections afforded a valuable property interest particularly where, as here, the delay is caused by the active

concealment of information by the party to be benefitted by the delay, in this instance by the personal representative.

It is also clear that the district court has distorted the precepts of Pope, Mullane, and City of New York, which mandate that a creditor be given "notice of such a nature as reasonably to convey the required information," by positing the notion that the duty to provide actual notice is vitiated by the creditor's "constructive knowledge" of the administration of a decedent's estate. The district court states that Gleason's death was certainly known to the petitioner's New York counsel, as it was known by "most everyone else in this country," and that "because nonclaim statutes are almost universally a part of state probate laws . . . claimant's New York counsel could hardly have been unaware that something should have been done in Florida." In re Estate of Gleason, 631 So.2d at 323. (App. A, 5). Such "constructive knowledge" arguments are precisely what Pope, Mullane, and City of New York held to be insufficient to comport with the requirements of due process.

Notwithstanding its lengthy discussion of the implications of Pope and Mullane to the instant controversy, the district court states that its decision to affirm the probate court's dismissal of the petition to reopen the Gleason estate is based upon petitioner's failure to do anything in the Florida estate until fourteen (14) months after it was closed. 631 So.2d at 323 (App. A, 4).

> Although claimant was not notified at the time notice of administration was published that he had three months in which to file a claim, Florida Probate Rule 5.495, effective January 1, 1989 (promulgated in response to Pope), provided for extension of the time in which to

> file a claim for a creditor who was known to the personal representative but was not served with a copy of the notice of administration.

Id. (App. A, 4). The district court notes that although this rule did not become effective until 1989, two years after Gleason died, the petitioner could have availed himself of this rule by filing a claim against the estate after the rule went into effect. Id. (App. A, 4).

The petitioner recognizes that this Court will not review state court decisions that rest on state law grounds that are independent of the federal question involved. See e.g. Caldwell v. Mississippi, 472 U.S. 320 (1985). In reviewing the district court's decision, it may appear that there is some procedural justification, unconnected with notions of due process, for denying the petitioner relief.

Here, however, the application of any rule of procedure governing the presentation of an estate creditor's claim (including Florida Probate Rule 5.495 which has since been repealed), necessarily requires an examination of the principles announced in Pope. Both the rule cited by the district court, as well as the Florida non-claim statutes, have undergone major revisions since the promulgation of Pope, and are so interwoven with federal due process jurisprudence that an independent state ground cannot be discerned from the face of the opinion. See e.g. Caldwell, 472 U.S. at 327.

Surely, the Court can see how the district court's observations regarding the applicability of any rule permitting the late filing of claims begs the question when the creditor affected never received actual notice of his obligation to do so before the estate has been closed. As previously stated, this is not a case where the known creditor sat idly by during

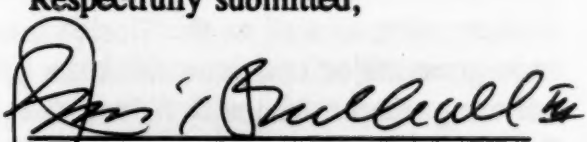
the estate administration and waited fourteen months to seek recognition of his claim. Here, it is undisputed that Petitioner was engaged actively in litigation with the Personal Representative during the estate administration. Any delay in the petitioner's presentation of this claim to the probate court here was due solely to the personal representative's failure to provide the petitioner with the constitutionally mandated actual notice of the contents of the notice of administration, namely, the procedure for presenting claims and the applicable limitations period.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Florida Fourth District Court of Appeal since the state court decision has unconstitutionally denied Petitioner due process of law in violation of the Federal Constitution as this Court has already announced in Pope and Mullane.

DATED: September 21, 1994

Respectfully submitted,



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Joined by Rutherford, Minerley & Mulhall, P.A., Boca Raton, Stuart E. Bloch and Lori S. Weiss

APPENDICES

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOR THE 4TH DISTRICT NO. 93-0253

L.T. CASE NO. 87-4443

IN RE: ESTATE OF
HERBERT GLEASON, ETC.,
Deceased.

KENNETH E. RAINE, as Trustee
of the Television Trust Agreement,

Appellant,

vs.

MARILYN GLEASON, formerly Personal
Representative of the Estate of
HERBERT JOHN GLEASON a/k/a
JACKIE GLEASON,

Appellee.

Opinion filed January 26, 1994

Appeal from the Circuit Court
for Broward County; John A.
Miller, Judge.

John T. Mulhall, III of Rutherford,
Minerley & Mulhall, P.A., Boca
Raton, for appellant.

John Campbell, Lucinda A. Hofmann and Daniel S. Pearson of Holland & Knight, Miami, for appellee.

KLEIN, J.

The appellant (claimant) appeals an order denying his motion to reopen Jackie Gleason's estate so he could pursue a claim based upon ongoing six-year-old litigation against Gleason in the state of New York. He argues that his failure to file a claim against the estate in Florida is no bar because he was not given actual notice of the time in which to file claims and was thus deprived of due process under Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988). We affirm.

In April 1986 claimant sued Jackie Gleason in New York alleging breach of an agreement regarding the television rights to The Honeymooners series. Gleason died a resident of Florida in June 1987 and Florida letters of administration were issued within 30 days. Although the record is not clear as to exactly how and when claimant became aware that Gleason's estate was being probated in Florida, the record does contain a September 1989 order of the New York court denying claimant's motion to substitute Gleason's personal representative without prejudice because the motion lacked sufficient documentation. In February 1990 claimant filed a second motion for substitution, which attached a copy of the letters of administration. The letters were dated July 7, 1987, and were stamped, "This estate must be closed within 12 months." Claimant did not file a claim in the estate.

In November 1990 the Florida probate court discharged the personal representative and the estate was

closed. During all of this time the litigation was continuing in the New York courts.

In March 1992 the claimant filed a petition to reopen the Florida estate so he could pursue his claim. The trial court dismissed the petition with prejudice, and claimant brought this appeal. [1]

Section 733.702(1), Florida Statutes (1987), which was applicable at the time, required claims against a decedent's estate to be filed within three months from the first publication of notice of administration. Notice by publication was all that was required. §733.212, Fla. Stat. (1987).

Subsequently the Supreme Court held, in Tulsa Professional Collection Services Inc. v. Pope, 485 U.S. 478,

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[1]Claimant first argues that the trial court should not have granted the motion to dismiss the petition for further administration of the estate because the trial court could not have concluded from the four corners of the petition that it should be denied. Claimant cites no authority for this proposition other than cases holding that the court must limit itself to reviewing the allegations of a complaint in determining the sufficiency of a motion to dismiss. There is a difference between determining whether a complaint states a cause of action and whether an estate should be reopened. We see no reason why a court cannot review the record of a closed estate when deciding whether the allegations of a petition to reopen an estate warrant further proceedings. Everything on which the court relied here was in the record.

491, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), that where the identity of a creditor is known to the estate, the due process clause of the Fourteenth Amendment requires notice by mail or such other means as will give actual notice of the non-claim period. In response to Pope, Florida's rules and statutes were revised to comply with the due process requirements of Pope. See In re Rules of Probate and Guardianship Procedure, 537 So. 2d 500 (Fla. 1988), and In re Estate of Hill, 582 So. 2d 701 (Fla. 1st DCA 1991).

Appellant argues that since he was a known creditor, having been involved in litigation against the decedent at the time of death, Pope requires actual notice that his claim against the estate had to be filed within three months from the first publication of the notice of administration. It is undisputed that appellant was not given actual notice of the three month period to file a claim, presumably because our statute did not then require it and Pope had not yet been decided. We conclude, however, that it was not the expiration of Florida's three month non-claim period which bars this claim, but rather claimant's failure to do anything in the Florida estate until 14 months after it was closed.

Although claimant was not notified at the time notice of administration was published that he had three months in which to file a claim, Florida Probate Rule 5.495, effective January 1, 1989 (promulgated in response to Pope), provided for extension of the time in which to file a claim for a creditor who was known to the personal representative but was not served with a copy of the notice of administration. Although rule 5.495 did not become effective until 1989, and Gleason died in 1987, the claimant could have availed himself of this rule by filing a claim against the estate after the rule went into effect. In re Estate of Hill, 582 So. 2d 701 (Fla. 1st DCA 1991) (the operative event making this

rule applicable is the pleading asserting the creditor's claim, thus allowing a creditor to proceed under this rule even though the death occurred and the notice of administration was published prior to the rule becoming effective).

If claimant's counsel in the New York litigation was not aware of Jackie Gleason's death at the time it occurred in June 1987, as most everyone else in this country was, the record shows that he knew it at least by September 1989. In February 1990 he filed the Florida letters of administration issued in July 1987 (stating that the estate had to be closed within twelve months) in New York. Since non-claim statutes are almost universally a part of state probate laws and states have a legitimate interest in expediting the settlement of estates, Pope, 485 U.S. at 479, claimant's New York counsel could hardly have been unaware that something should have been done in Florida.

The Court reiterated in Pope what it said in Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed. 865 (1950), which was that "whether a particular method of notice is reasonable depends on the particular circumstances."

We are not persuaded that the Pope court would have been sympathetic to this claimant. First the Pope court was not being asked to reopen an estate which had been closed for 14 months. Second the Pope claimant was a creditor who had no notice of the death and was merely seeking to file beyond a two month non-claim period, while this claimant was litigating against Gleason at the time of Gleasons' death, was represented by counsel who knew the estate was being probated in Florida, and took no action until 14 months after the estate was closed.

Although section 733.903, Florida Statutes (1987), authorizes reopening estate "if other property of the estate is discovered or if it becomes necessary that further administration of the estate be had for any cause", claimant has cited no authority to persuade us that this estate should be reopened under these circumstances. Since even discovery of a later will does not constitute grounds for reopening an estate, In re Estate of Killinger, 448 So. 2d 1187 (Fla. 2d DCA 1984), we conclude that the trial judge did not err in refusing to disturb the finality which should accompany the closing of this estate, which had been in probate for over three years.

Affirmed.

DELL, C. J., and GROSS, ROBERT M., Associate Judge, concur.

SUPREME COURT OF FLORIDA
Thursday, June 23, 1994

DISTRICT COURT OF APPEAL
4TH DISTRICT NO. 93-0253

CASE NO. 83,296

IN RE: ESTATE OF
HERBERT JOHN GLEASON, ETC.,

Petitioner,

vs.

MARILYN GLEASON, ETC.,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

GRIMES, C.J., OVERTON, SHAW and HARDING, JJ., concur KOGAN, J., dissent

Petitioner's Motion to Strike Respondent's Jurisdictional Brief is hereby denied.

A True Copy BH

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. John A. Miller, Judge

Mr. John T. Mulhall, III
Mr. Stuart E. Bloch
Mr. Barry L. Clayton
Mr. Daniel S. Pearson
Ms. Lucinda A. Hofmann

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

PROBATE DIVISION

CASE NO. 87-4443

IN RE: ESTATE OF
HERBERT JOHN GLEASON, a/k/a
JACKIE GLEASON,

Deceased.

ORDER DISMISSING PETITION FOR FURTHER ADMINISTRATION

This cause came before the Court on a motion to dismiss the Petition for Further Administration filed by Kenneth E. Raine, as Trustee of the Television Film Trust Fund Agreement dated February 1, 1954 (the "Trust Agreement"). The Petition for Further Administration, filed on March 4, 1992, seeks to vacate this Court's order discharging the former personal representative of this estate, Marilyn Gleason (who is the decedent's widow), and to reinstate Mrs. Gleason as personal representative in order that further administration of the estate be had. Mrs. Gleason filed a notice declaring this to be an adversary proceeding, and on April 7, 1992, she filed a Motion to Dismiss. Argument on the Motion to Dismiss was heard by the Court on June 25, 1992.

A motion to dismiss a pleading seeking affirmative relief tests the legal sufficiency of the pleading. Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320, 323 (Fla. 1956. Consideration of the defense is confined to the pleading attacked and the grounds asserted in the motion. Flye v. Jeffords, 106 So.2d 229, 232 (Fla. 1st DCA 1958). An affirmative defense appearing on the face of the pleading may be raised by a motion to dismiss. Rule 1.110(d), Fla. R. Civ. P.; see Popwell v. Abel, 226 So.2d 418,421 n.5 (Fla. 4th DCA 1969); see also Ader v. Temple Ner Tamid, 339 So. 2d 268 (Fla. 3d DCA 1976). However, in a proceeding seeking to reopen an estate, the Court is not precluded from examining its own file for the estate administration to determine whether notice of administration was duly published in the original proceeding, the duration of the claims period, and whether the petitioner filed a claim within that period. See Kent Ins. Co. v. Estate of Atwood, 481 So.2d 1294 (Fla. 1st DCA 1986); In re Estate of Bateman, 290 So.2d 528 (Fla. 3d DCA 1974). Indeed, Rule 5.460(a) requires that the petition be filed in the same probate file as the original administration.

BACKGROUND

The following factual matters appear upon the face of the Petition for Further Administration and the Court's file for the administration of this estate. Jackie Gleason died on June 24, 1987, domiciled in Broward County, Florida. Letters of administration were issued by this Court to Mrs. Gleason as personal representative of her husband's estate on July 7, 1987. A notice of administration was first published on July 20, 1987, pursuant to Fla. Stat. Sec. 733.212 (1987), and under Fla. Stat. Sec. 733.702 (1987) the period for filing claims in the estate expired on October 20, 1987. On November 8, 1990, this Court entered an order closing the

administration of Mr. Gleason's estate and discharging Mrs. Gleason as personal representative of the estate.

In 1986, more than a year before Jackie Gleason's death, Mr. Raine had commenced an action against Mr. Gleason and another party in the Supreme Court of New York County, New York, concerning the Trust Agreement. Subsequent to this Court's appointment of Mrs. Gleason as personal representative and before her discharge by this Court, Mrs. Gleason was substituted as a party defendant in the New York litigation in the place of her deceased husband. The Petition for Further Administration does not allege when Mrs. Gleason in her capacity as personal representative was substituted as a party in the New York litigation, but the Petition does state that the New York court granted Mrs. Gleason's motion to dismiss the complaint in that proceeding on June 8, 1990, which was exactly five months before this Court discharged Mrs. Gleason as personal representative. During the three-year period in which the estate was open, Mr. Raine never filed a claim in the estate, nor did he ever seek an extension of time to file a claim in the estate.

The Motion to Dismiss the Petition for Further Administration filed by Mrs. Gleason alleges that Mr. Raine as Trustee has no interest in the estate, and therefore that he lacks standing to request further administration because of Fla. Stat. §§733.701 and 733.702 (1987).

Analysis

Under the statutes in effect on the date of Jackie Gleason's death,[2] a person seeking to enforce a claim against a decedent was limited to a three-month period within which to file the claim in the estate proceeding. If not filed within that period, the claim was barred, and thereafter neither the estate, the personal representative, nor any beneficiary would be liable for the claim. Fla. Stat. §733.702 (1987). The three-month period for filing claims in the Jackie Gleason estate expired on October 20, 1987.

After the expiration of the claims period, but during the pendency of the probate proceedings, the United States Supreme Court decided Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). By the time Mrs. Gleason was discharged as personal representative in November of 1990, various changes to both the Rules of Probate and Guardianship Procedure and the Florida Probate Code had been made in response to the Pope case. The chronology of those changes, summarized in 1991 by the First District Court of Appeal in In re Estate of Hill, 582 So.2d 701 (Fla. 1st DCA 1991), is relevant here:

> To set the facts of this case in proper context, some background information should first be provided. On April 19, 1988, the United States Supreme Court decided Tulsa Prof. Collection Servs., Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

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[2]Because Jackie Gleason died before July 1, 1988, the 1987 version of the Florida Statutes is controlling. See In re Estate of Parson, 570 So.2d 1125 (Fla. 1990).

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creditors.

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Bar and the Probate and
Rules Committee of the Real
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joint committee, to suggest
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amended Rule 5.240 and the
le 5.495, which were approved
nd became effective on January
In re Rules of Probate and
Procedure, 537 So.2d 500 (Fla.
e 5.495 is titled "Petition to
for Filing Claim" and provides

of the estate files a petition to
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by law for presenting claims, or

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> a petition to require payment of claim, which claim was filed after the time allowed by law for presenting claims, and the petition alleges that the creditor was known to or reasonably ascertainable by the personal representative, but was not served with a copy of the notice of administration, such petition shall specifically allege facts showing that such creditor was known to or reasonably ascertainable by the personal representative. It shall also include a verified statement alleging either (i) the creditor did not have actual knowledge of those matters relating to creditors' claims required to be set forth in the notice of administration during the period allowed for filing claims against the estate, or (ii) facts sufficient to obtain relief under Rule of Civil Procedure 1.540(b)."
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> The committee note indicates that the rule is designed to provide a procedure for the filing of claims by estate creditors who have missed the filing deadline imposed by section 733.702.

582 So. 2d at 701-02. The First District Court of Appeal held in Hill that Rule 5.495 applied to the party seeking to assert a late claim even though the probate proceedings had begun before the effective date of the new rule, because the proceedings seeking to assert the late claim were begun after the effective date of the new rule.

Because the administration of Jackie Gleason's estate was not concluded until November of 1990, the Court finds that the principles enunciated in Pope apply to this case, as

do the changes to the Rules of Probate and Guardianship Procedure that became effective on January 1, 1989, and were in effect on November 8, 1990, the date this estate was closed.[3] However, as noted earlier, by his own admission in the Petition for Further Administration Mr. Raine was aware at least as early as June 1990 of Jackie Gleason's death, the pendency of probate proceedings for the estate in this Court, and the appointment of Mrs. Gleason as personal representative of the estate. Under those facts, the only proper method for Mr. Raine to have asserted his claim, and to raise any applicable due process arguments he may have had pursuant to Pope, was in a proceeding under Rule 5.495 during the pendency of this estate, rather than proceeding, as the one now before this Court, seeking further administration of the estate more than two years after it has been closed.[4]

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[3]The Court notes that Rule 5.495 was repealed effective October 1, 1991 (after the Gleason estate had been closed) because of changes enacted as part of Fla. Stat.§737.702 governing the right to seek an extension of time to file a claim. The changes to Section §733.702 were contained in Chapter 88-340, Laws of Florida, which applied only to estates of decedents dying after July 1, 1988. Additional revisions to §733.702 were made in Chapter 89-340, Laws of Florida. Therefore Mr. Raine's procedural remedies were governed by Rule 5.495 from its effective date of January 1, 1989, until this estate was closed on November 8, 1990.

[4] Indeed, the Petition for Further Administration itself fails to allege the specific facts required by Rule 5.495, that is, that the alleged creditor "did not have actual knowledge." Clearly Mr. Raine had actual knowledge of the pendency of the estate no later than June 1990. During the ensuing five-month period before this estate was closed, he could have

However, this is not a case concerning the compliance vel non of the personal representative with the due process requirements enunciated in Pope. The determining factor in this case is not whether Mr. Raine was served personally with the notice of administration, but rather his admitted knowledge of this estate administration proceeding and his complete failure to take any action at all in this estate until long after it was closed.[5] To rule otherwise would

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filed a petition to extend the time to file a claim pursuant to then extant Rule 5.495. However, to avail himself of the rule, he was required to plead a lack of actual knowledge of the matters relating to creditors' claims required to be set forth in the notice of administration, or facts sufficient to obtain relief under Rule of Civil Procedure 1.540(b). This he did not do.

[5] The Court is not persuaded by Mr. Raine's argument concerning Mrs. Gleason's alleged continued participation in the New York litigation following her discharge as personal representative. The effect, if any, of her actions in the New York proceedings is within the purview of the courts of the State of New York and is beyond the scope of review of the courts of the State of Florida. Nor does the filing of her petition for discharge in this Court during the course of New York litigation -- whatever its status may have been, and which the parties dispute -- involve any fraudulent concealment of an existing claim, because it was Mr. Raine who had neglected to file anything in this Court to preserve his claim. His failure to preserve his claim in the domiciliary probate proceedings before this Court, as elaborated elsewhere in this order, is completely dispositive of his rights against this estate, the former personal representative, and the persons succeeding to the assets of the

completely disrupt the orderly administration of decedents' estates and frustrate the legislative purpose of the claims statute.

The expeditious and fair administration of decedents' estate has long been the public policy of the law of this State, and remains so after Pope. That strong policy was recently reconfirmed by the Florida Supreme Court in Spohr v. Berryman, 589 So.2d 225 (Fla. 1991), reversing Spohr v. Berryman, 564 So.2d 241 (Fla. 4th DCA 1990). In Spohr the decedent's former wife and his children had failed to file a claim for amounts due them under a judgment of dissolution of marriage. However, within the claims period they did file a separate civil lawsuit against the decedent's personal representative seeking to enforce their rights. The Supreme Court ruled that the timely filing of the lawsuit did not satisfy the requirement of section 733.702 to file a claim against the estate.

> The primary purpose of section 733.702 is to promote an early determination of claims against an estate in order that the claims may be paid and the remaining assets distributed to the beneficiaries in an expeditious manner. It is important that all interested parties be able to ascertain that claims have been filed against an estate. When served with a complaint, a personal representative would know that a claim was being asserted, but other interested parties might not have such knowledge so as

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estate upon closing of the estate.

> to be able to take the necessary steps to protect their interests.

589 So. 2d at 229. Indeed, in the present case, where Mr. Raine cannot and does not allege that a complaint was filed against the personal representative during the claims period in any court, there can be no support for an argument that Mr. Raine complied with the requirements of the claims statute. [6] To reopen this estate under these circumstances would frustrate the strong policy for the expeditious administration of estates.

The Court therefore concludes on the basis of the petition for Further Administration [7] that Mr. Raine's claim is barred by Florida Statutes section 733.702 (1987); that pursuant to that section Mr. Raine's claim is not binding on the estate, the former personal representative, nor any beneficiary of the estate; and that pursuant to subsection (2)

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[6] Furthermore, it does not even appear from the fact of the Petition whether Mrs. Gleason as personal representative was substituted as a party defendant in the New York litigation before or after the expiration of the claims period.

[7] The Court notes that at the hearing on the Motion to Dismiss, counsel for Mrs. Gleason also raised as a defense the five-year statute of limitations appearing in Fla. Stat. Sec. 95.11 applicable to claims founded on a written instrument. From this it would appear that the claim of Mr. Raine would be barred even if this Court were to allow the estate to be reopened and the claim to be filed. Because it is unnecessary for the disposition of this matter, the Court does not rule on that argument.

of section 733.702 no cause of action on that claim survived the death of Jackie Gleason even though an action was pending at the time of his death. It is therefore

ORDERED AND ADJUDGED that Mrs. Gleason's Motion to Dismiss the Petition for Further Administration is granted, and the Petition for Further Administration is dismissed with prejudice.

DONE and ORDERED January 13, 1992.

/s/ JOHN A. MILLER
CIRCUIT COURT JUDGE